U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 August 2003

BALCA Case No.: 2002-INA-256
ETA Case No.: P2000-NY-02455333

In the Matter of:

SUSAN & ROBERT HERMANOS,
Employer,

on behalf of

CAMILLE HILAJOS PALMARES,
Alien.

Appearance: Mariana Vazquez, Esquire
New York, New York

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Cook, Live-in."[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 3, 2000, Employer, Susan & Robert Hermanos ("Employer") filed an application for labor certification on behalf of the Alien, Camille Hilajos Palmares ("Alien") to fill the position of "Live In Cook." (AF 11). The work hours were 8:00 a.m. to 8:00 p.m., and the job required two years of experience.

The CO issued a Notice of Findings ("NOF") on February 7, 2002, proposing to deny certification for failure to establish that the job opportunity was clearly open to any qualified U.S. worker as required by 20 C.F.R. §656.20(c)(8).[2] (AF 38). Employer was advised that the application contained insufficient information to determine if the position of domestic cook actually existed in the household or whether the job was being created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Employer was directed to provide rebuttal evidence which documented that the position of domestic cook was a *bona fide* job opportunity. Rebuttal, at a minimum, needed to include responses to seven questions, as well as to provide tax returns for the immediately preceding calendar year from the date of filing the application through the current year.

Counsel for Employer submitted a letter in rebuttal dated April 2, 2002, as well as an affirmation by Employer that the contents of the letter were true. (AF 81). Included as part of the rebuttal was a daily schedule for Employer's household, their entertainment schedule and copies of tax returns from 1999 through 2001. With regard to the schedules submitted, counsel for Employer stated that both husband and wife worked long hours, leaving their home before 9:00 a.m., and not returning until after 7:00 p.m. Employer included tax returns for the years 1999 through 2001. Employer's schedule on a weekly basis indicated that the cook cooked breakfast five days a week for Mr. Hermanos, the meals consisting of hot cereal, freshly squeezed juice, muffins, omelets, toast, tea

[2]The issue which was successfully rebutted will not be detailed herein.

or coffee, which took approximately one hour of time, and approximately one half hour for after breakfast meetings. Mrs. Hermanos ate lunch two to three days a week at home, consisting of salads, quiches, sandwiches, pasta and fresh fruit, which required approximately one hour of preparation time for each meal. Husband and wife had dinner together, which required one and a half to two hours of preparation time. Additionally, it was asserted that the cook spent a total of one hour daily on table settings, etc., and an additional hour to clean the kitchen area. Three to four times weekly, the cook went shopping. A schedule of entertaining for a year was also provided.

The CO issued a Final Determination ("FD") on May 23, 2002, denying certification. (AF 83). The CO found that Employer had failed to rebut the finding rendered pursuant to 20 C.F.R. §656.20(c)(8), inasmuch as Employer had failed to establish that the position was a *bona fide* one, clearly open to any qualified U.S. worker. Specifically, the CO found that Employer had failed to successfully address all questions raised in the NOF. Employer's rebuttal stated that the household consisted of a husband and wife who were out of the house during the day, leaving at about 9:00 a.m., and returning at about 7:00 p.m. The CO observed that this meant that for ten of the twelve hours in the cook's daily work schedule nobody in Employer's family would be home. Employer had stated that no cook had worked for them in the past, yet increasing business and social demands had increased their need for a cook. While Employer stated that 31% of their gross income would be used to pay the cook, the CO observed that the federal tax return showed that the cook's wages would exceed Employer's taxable income. Considering that an individual's disposable income is normally less than or equal to his taxable income, it did not appear to the CO that Employer could guarantee the wage offer being made to the domestic cook.

On June 26, 2002, Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 94).

DISCUSSION

The issue of whether a job opportunity for a domestic cook is a *bona fide* offer of employment under section 656.20(c)(8) was discussed by the board in *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). In that case, the Board adopted a "totality of the circumstances" test for consideration of whether an application was based on a mischaracterization of the position - the problem being the appearance that employers were using the domestic cook position to classify the job as a skilled position to avoid the long wait for a visa, when in reality, the employer was seeking a housekeeper who also had cooking duties. As the Board pointed out in *Uy*:

> when an employer presents a labor certification application for a "Domestic Cook," attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement....If a labor certification application mis-characterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-skilled domestic positions that include cooking duties.

The requirement of a *bona fide* job opportunity arises out of 20 C.F.R. §656.20(c)(8), which requires that an employer attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co. Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987). We find that the totality of the circumstances of Employer's household do not establish a *bona fide* job opporunity for a domestic cook.

In his Request for Review, Employer argues that the rebuttal provided was sufficient to demonstrate the need for a live in cook. On October 4, 2002, counsel also submitted a brief

containing new documentation. This Board will not consider the newly submitted material, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). *See also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

The CO has raised, among other issues, the question of the ability of the Employer to pay the stated wage. In her brief, counsel for Employer concedes that the figures listed by the CO as taxable income are correct, but argues that this does not mean the Employer could not guarantee the wage offer made to the cook. In support of this contention, it is argued that the CO ignored the fact that the Employers had substantial average gross income for the last three years. We recognize that a tax return may not reveal the whole picture regarding a family's financial circumstances. However, where a CO requests documentation of ability to pay, and the tax return indicates on its face a lack of sufficient funds to pay the proposed salary, an employer should provide a documented explanation of sources of funds not revealed on the tax return. *See Uy, supra* ("Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued.").

Here, Employer's brief on appeal presents evidence and argument that may have, if timely submitted to the CO, established the financial capacity to pay for a domestic cook. The argument that was actually presented at the rebuttal stage, however, was based on Employer's gross income as shown on the tax return and the claim that the cook's salary would only represent about 31 % of the Employer's gross income. (AF 73). From the evidence before her, the CO reasonably questioned that assertion. We take note that Employer's entertainment schedules indicate that many of the meals were related to Mr. Hermanos' occupation as a stock trader. (*see* AF 40-42, 44-46). Nonetheless, we observe that 31% of a household's gross income is a substantial expense, notwithstanding Employer's characterization that such an expense is reasonable given the alleged importance of a cook in regard to their business and income earning potential. (AF 73).

In *Jane B. Horn*, 1994-INA-6 (Nov. 30, 1994), labor certification was denied where the CO questioned whether the position of Domestic Cook was full-time and Employer's rebuttal only showed that the jobholder's typical 40 hour week would include serving the two adult members of the household twenty-five meals, serving the two school age children twenty-five meals, food shopping and minimal cooking for entertainment. In the instant case, Employer has shown that less than fifteen meals per week would be prepared on a regular basis.

While Employer claims that the family's busy work schedule has necessitated the addition of a domestic cook, it is observed that there is no income from a Schedule C, and no wages or salaries on Line 7 of their federal income tax returns. Although Employer repeatedly argues that Mrs. Hermanos's job prevents her from running the household, her job, as listed on her tax return, is housewife. The meals detailed as being prepared on a daily basis are minimal and basic.

The rebuttal failed to adequately address the circumstances which led to the current job offer. In sum, the totality of the circumstances herein does not establish that a *bona fide* position is, in fact, available to U.S. workers herein, and the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.